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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

19 Cr. 472 (PAC)

5 SALVATORE TAGLIAFERRO,

6 Defendant.

Conference

7 -----x
8 New York, N.Y.
9 March 29 , 2021
2:40 p.m.

10 Before:

11 HON. PAUL A. CROTTY,

12 District Judge

13 APPEARANCES

14 AUDREY STRAUSS

15 United States Attorney for the
Southern District of New York

16 BY: JARROD L. SCHAEFFER

THOMAS A. MCKAY

17 Assistant United States Attorneys

18 MICHAEL K. BACHRACH

RICHARD H. ROSENBERG

19 Attorneys for Defendant

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1 THE DEPUTY CLERK: United States of America versus
2 Salvatore Tagliaferro.

3 Counsel for the government, please state your
4 appearances.

5 MR. SCHAEFFER: Good afternoon, your Honor. Jarrod
6 Schaeffer and Thomas McKay for the government. We are joined
7 by Annie Pfeiffer from our office.

8 MR. BACHRACH: Good afternoon, your Honor. Michael
9 Bachrach and Richard Rosenberg, for the defendant, Salvatore
10 Tagliaferro.

11 MR. ROSENBERG: Good afternoon, your Honor.

12 THE DEFENDANT: Good afternoon, your Honor.

13 THE COURT: Good afternoon.

14 (Pause)

15 MR. BACHRACH: I do that often, your Honor, forgetting
16 my mask.

17 THE COURT: I apologize for my tardiness and failure
18 to bring my facemask with me.

19 Do the government or the defendant have any way they
20 want to proceed?

21 MR. SCHAEFFER: We are happy to do anything that is
22 easiest for the Court, your Honor, but we think that it
23 probably makes sense to walk through the outstanding motion or
24 the proposed voir dire, and we're prepared to discuss anything
25 that the Court considers relevant.

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1 THE COURT: Mr. Bachrach, Mr. Rosenberg?

2 MR. BACHRACH: That's fine, your Honor.

3 THE COURT: All right.

4 Let me take up the fair cross-section motion. We are
5 going to be issuing an opinion and a report and an order on
6 this today, and we're denying the defendant's motion for an
7 adjournment based on the fair cross-section application.

8 Constitutional challenges to holding the trial during
9 the COVID-19 pandemic. This continuance motion was filed on
10 September 29, 2020, and raised again on March 28, 2021, raising
11 Fifth and Sixth Amendment challenges re holding trial with
12 COVID-19 safety protocols. That motion is going to be denied,
13 and we will have an opinion for you by tomorrow.

14 Third, the defendant's request to equip voir dire
15 jurors with clear facemasks and make jurors pull down masks for
16 a few second during voir dire.

17 The jurors will have the KN95 masks and no other,
18 unless they're double masked. My information about the basis
19 for the request about the jurors pulling down their mask is
20 that the lawyers have to pull down their masks. I don't
21 believe that the lawyers will have to pull down their masks.

22 Motions *in limine*.

23 MR. BACHRACH: Your Honor, may I be heard on that last
24 point?

25 THE COURT: Yes.

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MR. BACHRACH: Thank you, your Honor.

The issue is that at one point during jury selection on a normal jury selection pre-COVID, there comes a point where the court asks the jurors to look at the defendant and the parties and say is there anyone there that you know, anyone that you recognize, and the parties do the same in looking at the jurors. The purpose of this is to ensure that neither side knows a juror.

If we are all wearing facemasks when that happens, and I understand that safety reasons for doing so, but if we are all wearing facemasks when this happens, it becomes very difficult to make that determination.

Earlier today, for example, when I entered court, I came onto the 14th floor and an individual, a man with gray hair said, "Michael, Michael how are you?"

And I looked at him and I had absolutely no idea who it was. It was Mr. Tagliaferro. I'm not kidding. It was quite funny. I should know him, but I did not recognize him. If I can't recognize my own client, how can I or the jury be expected to recognize him or me to recognize jurors. And there's always the possibility that even if a juror doesn't recognize the three of us that we might recognize them. But, again, it can't be done when the facemasks are on.

That's why I was suggesting only for a few seconds, no more than that, to lower the masks so that everyone can look at

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1 each other and then put the masks back on so that we can, both
2 the jurors can see us and say we don't recognize anyone and we
3 can see them and say we don't recognize them.

4 THE COURT: All right. The application is denied.

5 With regard to the motions *in limine*, the Court is
6 going to preclude the admission of the 1997 federal conviction
7 for any purposes at trial and cross-examination and direct
8 examination of any third-party witnesses.

9 I am going to defer ruling on the evidentiary issues
10 regarding Mr. Tagliaferro's confidential informant status. The
11 government may introduce evidence of kickback schemes with
12 personal injury law firms and with William Nicholas as both
13 substantive and impeachment evidence. An opinion will be
14 following today; if not today, then tomorrow.

15 I am going to grant the sealing request with regard to
16 the materials filed just recently about Mr. Tagliaferro's
17 status as an informant.

18 That's the pretrial motions.

19 Mr. Schaeffer and Mr. Bachrach?

20 MR. BACHRACH: Your Honor, just so I have clarity,
21 just so I am clear, so the government can introduce, for
22 example, the kickback scheme for any purpose, but you are
23 deferring for now on whether or not we could then introduce
24 evidence related to the confidential informant status, which
25 would be contradictory to that, at least on that as an example.

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1 Am I understanding correctly you haven't ruled on that
2 part yet?

3 THE COURT: Yes. I am deferring on that.

4 MR. BACHRACH: OK. Thank you.

5 THE COURT: The issue you pose, Mr. Bachrach, is?

6 MR. BACHRACH: The issue I pose, your Honor, if a
7 witness testifies, for example, that Mr. Tagliaferro was
8 involved in kickbacks, in a kickback law firm scheme, and he
9 does that in an effort to, for example, impeach
10 Mr. Tagliaferro's credibility, we should be able to say well,
11 wait a second, yes, he was involved in a kickback scheme, but
12 only as a confidential informant, and his role was acting as a
13 confidential informant at the time.

14 The witness, who is testifying to his belief, he may
15 have believed it was otherwise because he was involved in the
16 scheme or in other criminal conduct. But the fact of the
17 matter is, as your Honor knows from the 3500 material we
18 provided under seal, Mr. Tagliaferro was acting as a
19 confidential informant with respect to that. So if the
20 government is going to be able to have a witness claiming that
21 Mr. Tagliaferro's character can be attacked because he was a
22 member of this kickback scheme, we have to be able to defend
23 that and say, no, it wasn't.

24 THE COURT: Mr. Schaeffer, what do you have to say
25 about that, or Mr. McKay.

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1 MR. McKAY: If I may address this issue, your Honor.
2 Just two points of clarification we'd ask for.

3 First of all, with respect to what happens if we
4 cross-examine the defendant about the law firm kickback scheme,
5 we understand the defendant's position on that point, but it's
6 very difficult for us to respond to the proposition that it
7 would be fair game for them to then bring in information about
8 some confidential informant status, because the 3500 material
9 they disclosed to you in camera we have not yet received. Once
10 they provide that to us, if they do, that may well moot the
11 issue.

12 If it shows what they say it shows, we may well decide
13 to take the whole issue off the table, and that would save the
14 Court and the parties some time arguing about this. So we hope
15 that they'll turn that over in due course and we can decide
16 whether to moot this issue.

17 Then the second point on this is just we continue to
18 be a little bit confused about their position about the
19 government's opening the door. We perfectly well understand
20 their point about the law firm kickback scheme and their
21 assertion that that would open the door to information about
22 the confidential informant status. But in places in their
23 motion they seem to suggest that cross-examination about any
24 uncharged conduct would open the door to testimony about
25 confidential --

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1 THE COURT: It wasn't clear to me based on the
2 positions taken by the government and Mr. Tagliaferro. That's
3 why I said I was going to defer decision on this. We will just
4 have to hear a little more and see a little bit more and I will
5 make my ruling.

6 MR. McKAY: Understood, your Honor.

7 THE COURT: If you get the 3500 material and you want
8 to make a further submission, that's fine with me.

9 MR. McKAY: Understood. Thank you, your Honor.

10 THE COURT: Anything you want to point out about any
11 special requests for voir dire or preliminary instructions?

12 MR. SCHAEFFER: We note that we have several
13 objections to the proposals from the defendant, and I'm happy
14 to run through them, your Honor.

15 THE COURT: Yes.

16 MR. SCHAEFFER: Before we do that, I think there are
17 just two things that we may want to address up front.

18 One is whether the defense is withdrawing their motion
19 to withdraw from this case. Technically that is still pending
20 before the Court. We think that should be resolved before we
21 actually proceed to trial.

22 The second matter, assuming that that is withdrawn or
23 resolved, is that we need to do the *Curcio* inquiry.

24 THE COURT: Yes.

25 Mr. Bachrach?

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1 MR. BACHRACH: On the motion to withdraw, your Honor,
2 I believe our motion was to withdraw if the case wasn't
3 continued to April, and seeing as the case was continued to
4 April that was mooted. We did renew our continuance motion,
5 which was separate from the motion to withdraw on Fifth and
6 Sixth Amendment grounds, and your Honor has denied that.

7 THE COURT: I have ruled on that.

8 MR. BACHRACH: Exactly. That's my point. Your Honor
9 has ruled on that. So I don't think there's anything more that
10 needs to be done.

11 MR. SCHAEFFER: I would just note that one of the
12 issues that they reraised for the Court was a conflict of
13 interest, so I wanted to be clear and make sure we had a record
14 that was clear that they are no longer seeking to withdraw.

15 THE COURT: That's clear, isn't it, Mr. Bachrach?

16 MR. BACHRACH: We are not seeking to withdraw, your
17 Honor. That is absolutely true. But we are foreshadowing the
18 fact that doing a trial in the midst of COVID, we hope it won't
19 happen, but could impact any attorney's effectiveness. That is
20 all we were doing when we raised that objection at the time.
21 We still maintain it, but my understanding is your Honor has
22 denied it.

23 THE COURT: You have made that motion, and I've ruled
24 on it.

25 MR. BACHRACH: Exactly, your Honor.

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1 THE COURT: That's the way life is, right?

2 MR. BACHRACH: Exactly, your Honor.

3 THE COURT: OK.

4 MR. SCHAEFFER: We would ask your Honor if we could
5 proceed to the *Curcio* inquiry, and then I am happy to walk
6 through the government's objections to the voir dire requests.

7 THE COURT: Mr. Bachrach, what about you?

8 MR. BACHRACH: That's fine.

9 THE COURT: All right.

10 Mr. Tagliaferro, I have some questions for you.

11 THE DEFENDANT: Yes, sir.

12 THE COURT: Have you talked with Mr. Bachrach and
13 Mr. Rosenberg about the *Curcio* hearing?

14 THE DEFENDANT: I don't know what that means.

15 MR. ROSENBERG: The insurance company paying.

16

17 THE DEFENDANT: Oh, the insurance company paying.
18 Yes, I did, your Honor.

19 MR. ROSENBERG: The insurance company paying.

20 THE COURT: I have a few questions for you.

21 First of all, I want to ask you about your competence.
22 There's no doubt that Mr. Tagliaferro is competent, is
23 there?

24 MR. ROSENBERG: No question, your Honor.

25 THE COURT: OK.

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1 Mr. Rosenberg, should we swear Mr. Tagliaferro in for
2 this?

3 MR. ROSENBERG: By all means, your Honor.

4 (Defendant sworn).

5 THE COURT: OK. Please sit down, Mr. Tagliaferro.
6 Make yourself comfortable.

7 Are you currently represented by Mr. Rosenberg and
8 Mr. Bachrach?

9 THE DEFENDANT: I am, your Honor.

10 THE COURT: How long have these two attorneys
11 represented you?

12 THE DEFENDANT: Far too long, about 21 months.

13 THE COURT: OK. Are you satisfied with their
14 representation? Are you satisfied with their representation?

15 THE DEFENDANT: I'm thinking about wording. I wish
16 this trial was over a year ago.

17 THE COURT: I do too.

18 THE DEFENDANT: They're doing the best that they could
19 do under the circumstances.

20 THE COURT: Are you satisfied with them?

21 THE DEFENDANT: As well as I could be, yes.

22 THE COURT: OK. Do you wish them to continue to
23 represent you?

24 THE DEFENDANT: I do, your Honor.

25 THE COURT: OK. Have you paid these counsel, promised

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1 to pay them for their services in this case?

2 THE DEFENDANT: Well, they were paid through the
3 insurance company a great deal of money, and now they're
4 seeking more and I'm going to pay them, yes. But, your Honor,
5 may I say something?

6 THE COURT: Yes.

7 THE DEFENDANT: I think it's unfair that as a
8 defendant that I was billed \$120,000 because of COVID. I
9 wanted this case to happen a year ago, and, quite frankly, I
10 never agreed to any delay, and I was told that I don't have the
11 right to agree or disagree. It was a matter of the chief
12 justice. But the insurance company got billed \$120,000 during
13 that period of time and now quite frankly -- excuse me, sir.

14 THE COURT: Do you want some water?

15 THE DEFENDANT: Can I have a moment, please.

16 I put my family in debt to pay, and I will continue to
17 do so if need be. I am an innocent person, and I want to be
18 proven innocent at trial.

19 THE COURT: All right. What is your understanding of
20 the fee arrangement. How is it paid?

21 THE DEFENDANT: I give them money. He's asking for I
22 think \$60,000 right now. Quite frankly, I'm prepared today to
23 give him \$30,000, and I got to make arrangements for the
24 following \$30,000 because I just don't have it.

25 THE COURT: Do you know how much money the insurance

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1 company has expended?

2 THE DEFENDANT: \$200,000. And the date, the first day
3 I was in court, I met with Mr. Rosenberg, and my wife, who is
4 greatly concerned, and said what are we going do with fees?
5 And his response was: This covers \$200,000. We are not going
6 to go anywhere near that. So money shouldn't be a concern.

7 And then COVID hit. I do understand from
8 Mr. Bachrach, Mr. Rosenberg, and the staff were working, but
9 they weren't working on my behalf because I was ready, willing,
10 and able to come to court. I am not afraid of COVID. I am not
11 afraid of dying. I was always ready, willing, and able. And
12 so they continued to bill the insurance company every month,
13 some months as much as \$29,000, and I didn't even come into
14 court. I totaled it up last night. It was like \$120,000 due
15 to just COVID.

16 THE COURT: Mr. Tagliaferro, let me ask you, are you
17 out of pocket any money or has this all been reimbursed by the
18 insurance company, paid for by the insurance company?

19 THE DEFENDANT: No. Today I am going to be out of
20 pocket \$30,000, and then I am going to continue to owe him an
21 additional \$30,000. That would be \$60,000 out of pocket that I
22 just don't have, your Honor.

23 I am a carpenter. I have been working day and night
24 since I have been 14 years old and I don't have \$60,000.

25 THE COURT: I'm trying to understand. The \$200,000

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1 which is the insurance policy --

2 THE DEFENDANT: Yes.

3 THE COURT: -- as I understand it --

4 THE DEFENDANT: Yes.

5 THE COURT: -- that's been expended?

6 THE DEFENDANT: Yes.

7 THE COURT: You have no more money due from the
8 insurance company?

9 THE DEFENDANT: No more money.

10 THE COURT: And you are out of pocket for the legal
11 fees that you're paying to Mr. Rosenberg and Mr. Bachrach?

12 THE DEFENDANT: Yes, your Honor.

13 THE COURT: Well, Mr. Schaeffer and Mr. McKay, what's
14 the conflict now that it's been paid out?

15 MR. MCKAY: Your Honor, I think now that the insurance
16 policy has paid out, any fees expended going forward -- going
17 forward there is no potential conflict in the same way as when
18 the fees were being paid by the insurance company. We think
19 the Court should still complete the inquiry at least
20 retrospectively with respect to the choices that have been made
21 during the period in which the insurance policy was covering
22 the fees, but, again, we think that's at most a potential
23 conflict and would be that is eminently waivable.

24 And I'll just note that the, sort of the comments by
25 the defendant about agreeing to delay is a separate subject.

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1 We are happy to discuss it and make a record of the fact that
2 every single delay in this trial has been -- excuse me, every
3 single exclusion of time in this trial has been on consent,
4 many times with the defendant present at the time of the
5 consent. And so I think that is perhaps trying to create an
6 issue for down the road, but with respect to the *Curcio*
7 inquiry, the questions of delay are, I think, separate. The
8 only question is whether Mr. Tagliaferro wants to continue with
9 his present counsel.

10 THE COURT: He said he did. I asked him that
11 question, and he said he wanted to continue.

12 MR. McKAY: Right.

13 THE COURT: Mr. Rosenberg, do you want to continue as
14 his counsel?

15 MR. ROSENBERG: Well, yes, your Honor. I'm prepared
16 to go forward, of course.

17 THE COURT: Subject to the objections that you've made
18 to going forward.

19 MR. ROSENBERG: Subject to those objections, yes, but
20 of course I want to be comfortable that my client is satisfied
21 with counsel going forward.

22 THE COURT: Mr. Tagliaferro, are you satisfied with
23 counsel going forward, Mr. Bachrach and Mr. Rosenberg?

24 THE DEFENDANT: I am, your Honor.

25 THE COURT: All right. Now that the fees are

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1 expended, Mr. McKay, I don't see how there can be any conflict.
2 I don't see how there was any conflict.

3 MR. McKAY: I think that's certainly right going
4 forward, your Honor.

5 THE COURT: Retrospectively as well.

6 MR. McKAY: Right. As long as there's no claim by the
7 defendant that anything that happened in the past was the
8 result of some, you know, conflict of interest, and there has
9 been no such claim, I think that's right, your Honor.

10 THE COURT: Yes.

11 You are satisfied with the services that they've
12 rendered to you, aren't you, Mr. Tagliaferro?

13 THE DEFENDANT: Yes, sir.

14 THE COURT: You are not complaining about anything
15 that Mr. Bachrach or Mr. Rosenberg did, are you, in their
16 representation of you?

17 THE DEFENDANT: No, sir.

18 THE COURT: All right. I don't think I have to go
19 further with the *Curcio* hearing.

20 MR. McKAY: I think that's sufficient, your Honor.

21 THE COURT: All right.

22 Mr. Schaeffer, you had some things that you wanted to
23 bring to my attention?

24 MR. SCHAEFFER: Yes, your Honor. Several of the
25 proposed requests for voir dire we think are either redundant,

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1 duplicative, or inappropriate. I'm happy to walk through those
2 with the Court if that would be helpful.

3 THE COURT: Yes, please.

4 MR. SCHAEFFER: Beginning on defendant's proposed voir
5 dire, this is document 126 filed on ECF, on page 1, paragraph
6 1, I think this is just a matter of the parties kind of trying
7 to anticipate how long the trial will be --

8 THE COURT: What are you reading from? Voir dire and
9 directions questions?

10 MR. SCHAEFFER: Yes. Document 126, page 1.

11 THE COURT: I'm sorry. I don't have the document
12 number on the sheet. Tell me again what you are looking at.
13 Voir dire questions?

14 MR. SCHAEFFER: Yes. This is defendant Salvatore
15 Tagliaferro's proposed voir dire.

16 THE COURT: OK. Go ahead.

17 MR. SCHAEFFER: I am looking at page 1, paragraph 1.
18 I think this was just the parties attempting to anticipate the
19 length of trial, but it estimates the case at approximately
20 three weeks and indicates the Court will not be sitting on
21 Fridays.

22 I am not sure if that's accurate. To the extent that
23 it is not, we think it should be conformed to the actual trial
24 schedule

25 THE COURT: What is the trial schedule?

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1 MR. SCHAEFFER: I believe we are going to discuss that
2 today, your Honor, but my understanding is that we would be
3 sitting Monday through Friday at a predetermined time, and the
4 parties have estimated that the case will last no more than two
5 weeks.

6 THE COURT: Certainly, I agree with the two weeks.

7 David, what's the schedule for the trial? Is it 9:30
8 to --

9 THE DEPUTY CLERK: 9:45 to 3:45, Judge.

10 THE COURT: 9:45 to 3:45, five days a week.

11 MR. SCHAEFFER: The government also believes that the
12 second portion of paragraph 1, which asks if there's any reason
13 related to COVID-19 that the juror could not sit, we think it's
14 duplicative of the next question, which also asks about
15 COVID-19 and also, frankly, your Honor, is duplicative of the
16 supplemental questionnaire that's been already sent to every
17 one of the jurors in the pool which the Court has seen in
18 connection with the JSSA motion that was made.

19 THE COURT: OK.

20 MR. SCHAEFFER: We do understand paragraph 2 may be
21 helpful for the jury, especially since the courtroom may look
22 different. But looking at page 2, paragraphs 3 and 4, we think
23 ask somewhat invasive questions of the jury regarding their
24 medical condition and whether or not they have been vaccinated.
25 We don't think they are necessary in light of all the

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1 precautions that have been taken and we don't think they should
2 be asked.

3 THE COURT: All right.

4 MR. SCHAEFFER: With respect to paragraph 5.

5 THE COURT: When I say "all right," I don't mean I am
6 agreeing with you; I mean I'm receiving the transmission.

7 MR. SCHAEFFER: I understand, your Honor.

8 THE COURT: I will let you know when I ask the voir
9 dire question, but I will note your objection.

10 MR. SCHAEFFER: With respect to paragraph 5, we object
11 to this question. This was also one of the arguments raised by
12 defense counsel in the motion which the Court has now denied.
13 We think that it should be removed for that reason.

14 THE COURT: OK.

15 MR. SCHAEFFER: With respect to paragraph 9 at the
16 bottom of this page, page 2, we think that this question is
17 redundant both of paragraph 8 and that it is just not necessary
18 to ask. It is a bit invasive about prior plans and is
19 unnecessary.

20 We also believe that paragraph 10 is redundant and
21 unnecessary to ask. We would also note that it's a bit vague
22 to the government. We are not quite sure what that paragraph's
23 asking, but we would object to it regardless.

24 MR. SCHAEFFER: Section 3, which begins on page 3 and
25 continues to page 4, captioned Nature of the Charges, the

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1 government objects to that entire section. In particular, it
2 objects to characterizing Mr. Tagliaferro's prior employment,
3 which are facts outside of the indictment, and also objects to
4 the characterization of the central claim underlying the
5 government's case which is inaccurate and misleading to the
6 jury.

7 THE COURT: All right.

8 MR. SCHAEFFER: The government objects to paragraph
9 18, which appears to be duplicative to paragraph 19, and also
10 suggests additional information about the defendant and his
11 prior employment and activities which we think is
12 inappropriate.

13 We also object to paragraph 23 on page 5, which we
14 think is unnecessary and an invasion of jurors' privacy.

15 MR. BACHRACH: I'm sorry, which question?

16 MR. SCHAEFFER: 23.

17 THE COURT: Go ahead.

18 MR. SCHAEFFER: We think it is an invasion of privacy
19 and just unnecessary and irrelevant to ask about the jurors'
20 employment.

21 Then I would skip to page 8. The government would
22 object to requests 49, 50, 51, and 53. We think that all of
23 them are unnecessary and an invasion of the jurors' privacy.
24 We fail to see how the location of the parents' birth of the
25 jurors is relevant to any question that could be asked

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1 properly.

2 Then the government also objects finally to 55, 56,
3 and 58 for substantially the same reasons.

4 THE COURT: OK.

5 MR. SCHAEFFER: Thank you, your Honor.

6 THE COURT: Mr. Bachrach, do you want to be heard on
7 any of these objections plus any objection you have to the
8 government's voir dire?

9 MR. BACHRACH: Yes, your Honor, on some of them.

10 I am just going to go in order, so I may be a little
11 repetitive.

12 THE COURT: Yes, please.

13 MR. BACHRACH: Obviously on 1 the defense has no
14 objection to the government's changes.

15 On No. 2, we think that question remains very
16 important, but we do think the question should be changed
17 because we listed three weeks and it is actually now going an
18 estimated length of two weeks.

19 On question 1, I should go back. I should say, is
20 there any reason, including reasons related to the COVID-19
21 pandemic, that would make serving on a jury difficult for you?

22 If the government feels that's -- well, repetitive in
23 any way. I would suggest, however, your Honor, that time
24 passes in between when they fill out the supplemental
25 questionnaire and when they arrive in court, and the purpose is

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1 to make sure that as of now, when they're being seated, that
2 they still have no objections.

3 However, there is no question at the end -- we had put
4 the hardship question, we had incorporated that into, because
5 we say both any reasons for COVID or hardship. So it might
6 make more sense to simply put that question at the very, very
7 end, that last sentence of paragraph 1, at the very, very end,
8 so that at the very end of questioning the Court asks, Having
9 heard everything that you've gone through essentially, is there
10 anything else that we should be aware of that would make it a
11 hardship or would make you uncomfortable sitting as a juror,
12 because that's really what that is about.

13 THE COURT: All right.

14 MR. BACHRACH: Nos. 3 and 4, we don't view it -- I
15 mean, we are having a trial in the middle of a public health
16 crisis where apparently, as of yesterday's newspapers, New York
17 and New Jersey have the highest percentage of COVID in the
18 country. I don't think it's unreasonable to ask jurors whether
19 they have been vaccinated, thus making everyone else safer. I
20 also don't think it's unreasonable to ask the juror whether
21 they would be uncomfortable if a juror they were seated with
22 was not, because obviously that's going to be on people's
23 minds. I don't think --

24 THE COURT: You know we've conducted a number of
25 trials independent of vaccination.

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1 MR. BACHRACH: We have, and we had one juror, at least
2 one juror to my knowledge, that tested positive.

3 THE COURT: Said he tested positive.

4 MR. BACHRACH: I'm sorry?

5 THE COURT: Said he tested positive.

6 MR. BACHRACH: This is true, your Honor. I haven't
7 seen his medical records. That is true. I understand he was
8 excused because of that.

9 THE COURT: That's correct.

10 MR. BACHRACH: But the point is -- and maybe your
11 point is actually even more important. He said he did. Well,
12 we don't know if he did. Well, obviously he said he did,
13 because at the very least he was concerned to come into court
14 with COVID.

15 Well, that may be on the minds of other jurors as
16 well. These questions are to try to root out jurors who,
17 because of COVID, would feel uncomfortable sitting as a juror.
18 We don't want jurors sitting on here who are going to be
19 looking at their clock the whole time, scared, and just wanting
20 to get out. We want jurors who --

21 THE COURT: You know Judge Rakoff impaneled a jury and
22 they had a jury trial for two or three weeks. He tells me he
23 didn't ask a single question about COVID in the voir dire.

24 MR. BACHRACH: I understand that, your Honor. But
25 just because, respectfully, your Honor, just because a judge

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1 didn't do it doesn't mean that your Honor shouldn't do it.

2 THE COURT: I understand.

3 OK. What else do you have, Mr. Bachrach?

4 MR. BACHRACH: OK. Going to 8, 9 and 10.

5 So these are different questions, your Honor. The
6 government's arguing they are duplicative, but they are asking
7 different things.

8 No. 8 is in essence asking whether they or anyone
9 close to them actually has worked in law enforcement. That is
10 a fairly common question to be asking jurors to weed out bias.

11 The next one is not if they did work in it, but if
12 they were trying to work in it, if they applied. Again, it's
13 distinction, but it is an important difference. It is to weed
14 out bias.

15 No. 10, the government is confused by what we mean by
16 have you or anyone close to you ever had contact with law
17 enforcement? Well, see, that is, of course, different than
18 whether you have applied for them or whether you have worked
19 for them. That could mean whether or not you were arrested, or
20 whether or not you were the victim of a crime or had any other
21 reason to be interviewed by law enforcement.

22 Again, biases one way or the other can come up
23 throughout those interactions. So we believe that is a very
24 appropriate question, and it is, again, a fairly common
25 question to ask.

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1 With respect to the Section 3, the nature of the
2 charges, if the government is stating that we've misstated the
3 explanation of how they are going to put in their case, then
4 obviously we don't want to misstate their case. We were trying
5 to summarize what we thought -- it was our understanding of
6 their case. So we have no objection to a change to be more
7 accurate to the government's case if that's one they proposed.

8 No. 18 and 19, which goes to the fact -- the
9 defendant, of course, been charged or spent his year as a union
10 organizer and as a carpenter. Wanting to know whether or not
11 jurors have a bias against those organizations we believe is
12 relevant, particularly because although the parties are going
13 to do a very, very -- they are going to try their best to keep
14 the specter of the Mafia and organized crime out of this case.
15 I believe both parties have been talking about trying to keep
16 that out. Common knowledge in the city is that the Mafia and
17 organized crime have a long history in the unions, a real hold
18 on many unions, maybe not this one, but others. And we want to
19 make sure that there are no jurors who look at Mr. Tagliaferro
20 with an Italian last name, and say this Italian last name
21 working in this business that's known to have the mob, we don't
22 want them biased into thinking that in some way he's part of
23 the mob, when he clearly is not and has never been accused of
24 it and isn't certainly accused of it today. So we are trying
25 to weed out certainly that potential bias, but doing so in a

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1 way that doesn't draw attention to the worst specter that we
2 are trying to keep out of it, that both parties are trying to
3 keep out of the case.

4 THE COURT: All right. I have your point.

5 MR. BACHRACH: 23, the government is going to be -- it
6 is our understanding of the government's evidence that they are
7 going to be putting in evidence related to the ethical codes of
8 employees of Mr. Tagliaferro's union, ethical codes that
9 Mr. Tagliaferro was required to sign on to. We believe that if
10 jurors have gone through that similar process that could affect
11 their view of the evidence, because they would have an
12 independent knowledge that might impact their view because,
13 what they have done may not necessarily be done in the same way
14 but they may substitute dispute their own knowledge for the
15 facts before them, your Honor. That would be our concern, and
16 why we are trying to weed out again unintentional biases.

17 Going to 49 and 50, where were you born and where were
18 your parents born, these are fairly common questions, your
19 Honor, we are trying to find out background. Learning where a
20 person is born informs a great deal about how a person, what a
21 person oftentimes believes or at least what they went through
22 in their life experiences. It helps to understand --

23 THE COURT: I don't have any trouble with where were
24 you born.

25 MR. BACHRACH: OK.

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1 THE COURT: Where were your parents born is more
2 problematic.

3 MR. BACHRACH: I can say through personal experience
4 that I was born in the United States, my parents were born in
5 Germany. The fact my parents were born in Germany, that
6 informs me a great deal. As a German Jew it's definitely made
7 a difference in my lifetime and upbringing, and I can see
8 where -- a child's background, where their parents come from,
9 informs them as well.

10 THE COURT: I've never asked it, but I'll consider it.

11 MR. BACHRACH: No. 53, whether they are working in
12 person or remotely. The purpose of that question, if they have
13 been working remotely this whole time it could impact how they
14 feel coming into court for the first time and being around
15 people for the first time, whereas if they have been working in
16 person the whole time, then that wouldn't be a concern for the
17 juror.

18 So, again, we are trying to figure out things about
19 the jurors, trying to learn about their potential biases, but
20 also gain information that are race neutral bases to inform
21 peremptory strikes.

22 The name and general location of your employer.
23 That's just a fairly common question to ensure there's no
24 overlap with this case in any way.

25 And the questions about the spouse again, it's just --

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1 it's trying to ensure, just like when you ask a client what do
2 you do for a living, you are asking what their spouse does for
3 a living, because you spend a lot of time with your spouse and
4 you learn a lot from them, and that could inform who you are.

5 Those are our positions, your Honor.

6 We have no objections over to the government's
7 questions. I should say a lot of them are overlapping, but we
8 don't have an objection to the ones that the government
9 proposed.

10 THE COURT: All right.

11 Any comments on the preliminary instructions?

12 MR. McKAY: Sorry. I don't think we've seen the
13 preliminary instructions. Has the Court drafted preliminary
14 instructions?

15 THE COURT: We prepared them. I thought we sent them
16 out. We haven't sent them out. We'll send them out tomorrow.
17 You'll have them tomorrow. If you want to comment on them,
18 you're welcome to comment.

19 MR. McKAY: Thank you.

20 MR. BACHRACH: Thank you, your Honor.

21 THE COURT: You should know, when we get to the time
22 for jury deliberations, I send in a copy of my jury charge to
23 the jury. I also send in one copy of the indictment. So the
24 indictment has Counts Four and Five in it, which are no longer
25 applicable. So put your heads together and come up with a new

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1 revised indictment containing Counts One, Two, and Three.

2 MR. SCHAEFFER: Thank you, your Honor.

3 Then the government would just like to put on the
4 record that, while they have had informal discussions with
5 defense counsel regarding pretrial disposition in this matter,
6 the government has never extended a formal plea offer in this
7 case.

8 Then we just have a few quick questions for the Court
9 so that we make sure that we get materials to you --

10 THE COURT: I saw a *Pimentel* letter.

11 MR. SCHAEFFER: Yes, we did provide a *Pimentel* letter
12 on January 26, 2021.

13 THE COURT: Nothing after that?

14 MR. SCHAEFFER: No, your Honor.

15 THE COURT: All right.

16 MR. SCHAEFFER: And that *Pimentel* sets forth a
17 guidelines calculation with a sentencing range of 151 to 188
18 months.

19 THE COURT: Correct.

20 MR. SCHAEFFER: Beyond that, your Honor, we just have
21 a few questions for the Court on --

22 THE COURT: Yes. Go ahead.

23 MR. SCHAEFFER: -- when the Court would like exhibit
24 and 3500 binders and how many copies the Court would like.

25 THE COURT: I would like two copies. You can do it by

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1 Wednesday, no later than Thursday.

2 MR. SCHAEFFER: Certainly, your Honor.

3 THE COURT: How voluminous are they?

4 MR. SCHAEFFER: They are going to be somewhat large, I
5 believe, your Honor.

6 We haven't compiled them exactly yet, but there will
7 be several hundred pages of them.

8 THE COURT: All right.

9 MR. SCHAEFFER: Would the Court like 3500 for all
10 witnesses or just testifying witnesses.

11 THE COURT: Just the testifying witnesses.

12 MR. SCHAEFFER: That will significantly cut it down,
13 your Honor.

14 Then we have a brief matter to raise with the Court
15 concerning potential video testimony. On that point I would
16 defer to Mr. McKay.

17 THE COURT: Mr. McKay.

18 MR. McKAY: Just to raise this for your Honor.
19 There's one government witness and one potential defense
20 witness for whom video testimony may be necessary. We are in
21 discussions with defense counsel about whether each party
22 consents to the other party's proposed video witness and what
23 the logistics of that would be. So far I think we're working
24 well together, and so there's nothing for the Court to decide,
25 but we'll certainly let you know if there is some dispute that

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1 arises. We just wanted to let you know there is a possibility
2 of at least one witness who would appear by video.

3 THE COURT: Why are they appearing by video?

4 MR. McKAY: It depends on which witness. There is a
5 government witness whose mother-in-law in North Carolina had a
6 stroke, and he needs, along with his wife, to travel to North
7 Carolina to care for her. We are hoping to arrange a way that
8 that's not necessary so that he doesn't have to testify by
9 video, but that's the circumstance there.

10 There is a potential --

11 THE COURT: Where would the testimony take place? In
12 the courthouse in North Carolina?

13 MR. SCHAEFFER: We have not confirmed that yet. If
14 the Court has any guidance or preference, we're happy to
15 conform with that.

16 THE COURT: I think it would be better if you did it
17 in the courthouse.

18 MR. McKAY: I think that's right. Ensuring the
19 technological -- we don't have a guy in his basement trying to
20 figure out on his own laptop. We would like to make sure
21 there's some technological assistance to make sure we don't
22 have a problem. We talked to the IT folks here at the
23 courthouse about the different options, and we are working to
24 figure that out. Hopefully we will avoid this entirely and
25 have the witness here in person, but we are still working on

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1 that.

2 THE COURT: All right.

3 MR. McKAY: With respect to the defense witness, I
4 believe the witness has actually tested positive for COVID.
5 So, although he's local, there would be an issue with him
6 coming to the courthouse, and therefore, again, the likelihood
7 of a video testimony if they call him.

8 THE COURT: All right.

9 MR. BACHRACH: Your Honor --

10 THE COURT: What is the state of his illness,
11 Mr. Bachrach.

12 MR. BACHRACH: He's quite ill, your Honor. It's not
13 mild symptoms. He has got bad pneumonia as well. It is
14 unfortunately not a mild case.

15 It is a recent diagnosis, your Honor. So while he
16 might be better -- if this was a three-week trial, it might be
17 plausible that maybe towards the end he might be available, but
18 now that we are looking at a one- to two-week trial
19 realistically I think don't think he would be recovered by that
20 point.

21 THE COURT: I was looking at a two-week trial. You
22 just said one to two weeks.

23 MR. BACHRACH: The government's case is one week, and
24 it may spill into the second week. And the defense case is no
25 more than one to two days. But, in any event, he wouldn't be

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1 outside the quarantine period in all likelihood. Again, he is
2 quite sick right now. So even the quarantine period counting,
3 I don't think it would even begin until he is fully recovered,
4 which he is not at this point.

5 THE COURT: All right.

6 How many alternates do we need in light of the fact
7 that this is going to be a two-week trial.

8 MR. SCHAEFFER: We would recommend four, your Honor,
9 just to be completely safe.

10 MR. BACHRACH: We would agree, your Honor.

11 THE COURT: Four. How do you want me to impanel them?
12 Normally what I do is take the jury and get a jury of 12 and
13 establish that it is satisfactory and then impanel -- I guess
14 how many people do we have? You would each have two peremptory
15 challenges. So we would put in six more.

16 MR. SCHAEFFER: We think that's right, your Honor.

17 THE COURT: Mr. Bachrach, Mr. Rosenberg?

18 MR. BACHRACH: I believe so, your Honor. That's fine.

19 THE COURT: Put in six and each of you would exercise
20 your two challenges. That would leave two. I guess we would
21 have to put in eight people.

22 MR. BACHRACH: Your Honor, I guess there are normally
23 two alternates.

24 THE COURT: Then I would have to put in eight. If you
25 want to put in four alternates, I would have to put in eight.

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1 MR. BACHRACH: Yes, your Honor.

2 MR. SCHAEFFER: Yes, your Honor.

3 THE COURT: What time should the jury show up on
4 Monday?

5 THE DEPUTY CLERK: 10:30, 11.

6 THE COURT: What courtroom are we in?

7 THE DEPUTY CLERK: 26B.

8 THE COURT: We are in 26B. I suggest that each of you
9 go up to 26B and familiarize yourself with the layout. If you
10 have any problems, let us know.

11 MR. BACHRACH: Your Honor, if I may, what time would
12 you want the parties to arrive on a daily basis? I know with
13 the courthouse there are procedures as to when people are
14 allowed to arrive at the same time as the jurors or not at the
15 same time as the jurors. I don't quite know how the spacing
16 is.

17 THE COURT: I am normally in the courthouse by 9
18 o'clock in the morning. What I would prefer is, rather than
19 having sidebar conferences, we take things up in the morning or
20 at lunchtime or at the close of business so that you know where
21 you are going.

22 That would suggest to me that you ought to be here,
23 for a 9:45 start, you be here by 9:15.

24 MR. BACHRACH: Is it acceptable, your Honor, if --
25 although I think I would endeavor to make it here at 9:15 every

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1 day as well, I have child care issues, so if I am delayed as
2 long as Mr. Rosenberg is here as lead counsel, that's
3 acceptable to you by 9:15.

4 THE COURT: Yes. That's acceptable.

5 MR. BACHRACH: Thank you.

6 A similar question that the government asked: With
7 respect to defense 3500 material, you know, we are still
8 deciding which witnesses to call, if any, but assuming we do,
9 when would your Honor like 3500 material from the defense?

10 THE COURT: Well, I asked the government to produce it
11 by Thursday. If you can produce it by Thursday, Mr. Bachrach,
12 I would appreciate it.

13 MR. BACHRACH: Everything we have to that date we will
14 provide to your Honor on Thursday. Thank you.

15 THE COURT: On Friday I am going to observe. It's
16 Good Friday. So I won't be in the office until Monday morning.
17 So if you get it in on Thursday, that would be helpful.

18 MR. BACHRACH: We will, your Honor.

19 THE COURT: Thank you.

20 Is there anything else, Mr. Schaeffer or Mr. McKay?

21 MR. SCHAEFFER: Nothing further from the government.

22 THE COURT: Mr. Bachrach?

23 MR. BACHRACH: Nothing else, your Honor.

24 Thank you.

25 THE COURT: Thank you very much.

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1 Thank you, Mr. Tagliaferro.

2 THE DEFENDANT: Thank you, your Honor.

3 (Adjourned)

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